PREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,
Petitioner,

vs.

JOHN LISI, Etc., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AIRLINE PASSENGERS ASSOCIATION AS AMICUS CURIAE

WILLIAM A. JENNINGS,
FLOYD A. DEMANES,
1860 El Camino Real - Penthouse,
Burlingame, California 94010,
Counsel for Airline Passengers Association, Amicus Curiae.

A. LEE SANDERS,
DEMANES & JENNINGS,
1860 El Camino Real - Penthouse,
Burlingame, California 94010,
Of Counsel.

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BRIEF OF AIRLINE PASSENGERS ASSOCIATION AS AMICUS CURIAE

NATURE OF THE INTEREST OF THE AIRLINE PASSENGERS ASSOCIATION

The Airline Passengers Association (APA) is an unincorporated organization of over 11,300 members. It came into being in 1959 to serve the welfare of persons who regularly fly on domestic and international air carriers. A large number of its membership often fly in "international air transportation" within the

meaning of the Warsaw Convention. As a result, the APA is vitally concerned with the social and economic effects that the Convention has had and will continue to have upon its members and the public.

ARGUMENT

A. INTRODUCTION.

At the outset the Airline Passengers Association (APA) wishes to emphasize that the issues raised by this case must be considered in the context of present day economic realities. Americans provide the bulk of international air transportation revenue. Further, they enjoy one of the highest standards of living in the world.

B. THE APPLICATION OF THE WARSAW CONVENTION LIMITATION RESULTS IN THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Treaty provisions cannot abrogate rights protected by the Amendments to the Constitution of the United States. *Reid v. Covert* (1957) 354 U.S. 1. Hence, any Treaty provision agreed to by the Executive and duly ratified by the Senate must conform to the Constitutional restrictions upon the powers of the United States government created by the Fifth Amendment. Neither the Executive nor the Senate can deprive citizens of their property without due process of law.

"Property" as used in the Fifth Amendment should not be narrowly construed so as to be limited to

tangible quantities. See *Sardino v. Federal Reserve Bank of New York* (2d Cir. 1966) 361 F.2d 106. The ability of the individual to convert his labor into things of universal value is measurable in definite terms. It is well known that actuarial science has reached a point where one's future earning capacity can be established with a high degree of accuracy. Government, financial institutions and insurance companies rely heavily upon the reasonableness of these calculations.

When this earning capacity is destroyed or diminished, because of death or disability, the injured parties are deprived of valuable property of a measurable magnitude. This is illustrated in Appendix A. Throughout this country and most of the world the rule is universal that where this earning capacity is wrongfully destroyed or diminished the injured parties are entitled to compensation.

The APA respectfully suggests to the Court that when an arbitrary maximum limit is placed on such compensation the injured parties are deprived of "property" without due process of law. The difference between the limit and the actual loss has been taken from them without even the slightest exercise of jurisprudence.[1] Where that limit is as low as that found in the Warsaw Convention ($8,300.00) the gravity of the deprivation is manifest.[2]

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[1]See Appendix B.

[2]Even those few states of the United States that have retained maximum limitations on damages for wrongful death have rejected such a low value. See Appendix C.

This low limit became applicable to the claims of these plaintiffs by reason of conduct of the Executive and the Senate. The APA contends that these activities were in violation of the due process restrictions of the Fifth Amendment of the Constitution of the United States. Hence, the $8,300.00 limitation of the Warsaw Convention as applied to these plaintiffs has deprived them of property without due process of law.[3]

C. THE CARRIER IS IN A BETTER POSITION TO BEAR THE BURDEN OF NOTIFICATION OF THE APPLICABILITY OF THE WARSAW CONVENTION.

The APA suggests that the underlying policy consideration is that the carrier must bear the burden of notification of the applicability of the Warsaw Convention. *Warren v. Flying Tiger Line* (9th Cir. 1965) 352 F.2d 494; *Mertens v. Flying Tiger Line* (2d Cir. 1965) 341 F.2d 851, cert. denied (1965), 382 U.S. 816. Should the provisions of Article 3 (1) and (2) be construed to require the carrier to adequately notify the passenger? Or, should the passenger be obligated to search, with a magnifying glass, through the labyrinth of fine and often unreadable print found on passenger tickets? Then, should the passenger bear the burden of construing such language to determine whether the flight is in "international air transportation"?

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[3]It should be noted that such a ruling would not defeat the uniformity in international law created by the Convention. Presently there are three limits being applied: (1) the Warsaw limit ($8,300), (2) the Hague Protocol limit ($16,600), and (3) the limit of the Interim Agreement ($75,000).

The APA contends that the carrier is in a far better position to communicate to the passenger the fact that the transportation contracted for is subject to the provisions of the Convention. They have greater resources and facilities. The average passenger is little concerned with the legal technicalities involved. He or she is much less able to make the complex determination of whether the transportation contracted for is "international" within the meaning of the Warsaw Convention.

The law is clear in its command that a common carrier owes the highest degree of care to its passengers. The carrier has a positive obligation to do everything necessary to render its passengers safe from harm and distress. Such an obligation is poorly met when an air carrier so constructs its passenger ticket that those provisions which would notify the passenger of the limit of the carrier's liability are effectively concealed.

The Civil Aeronautics Board has imposed this burden of notification upon the carrier subsequent to the accident involved herein. The Federal Aviation Regulation (FAR) Section 221.175 requires the carrier to furnish each passenger with a written statement to the effect that the Convention may apply and that it may limit the carrier's liability. Further it provides that such a statement must be printed in "type at least as large as ten point modern type." Admittedly this regulation was not effective at the time of this accident. Be that as it may, FAR 221.175 clearly indicates the policy of the Executive Branch; to wit,

that air carriers in international transportation have a greater obligation to the passenger than to print such statements in print so small as to be "virtually invisible" and "unreadable."

CONCLUSION

The $8,300.00 Warsaw Convention limitation was established at a time when international aviation was an infant industry. The infant has grown into a giant. It is able, but unwilling, to assume its adult responsibilities. No longer does the practical justification for the limitation exist. Hence, if the limit has no justification in fact, it should have no application in law.

Dated, Burlingame, California,
February 5, 1968.

Respectfully submitted,
WILLIAM A. JENNINGS,
FLOYD A. DEMANES,
Counsel for Airline Passengers Association, Amicus Curiae.

A. LEE SANDERS,
DEMANES & JENNINGS,
Of Counsel.

(Appendices A, B and C Follow)